Filed 12/7/09 In re Bryan I. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re BRYAN I. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. DEBRA B., Defendant and Appellant.	G042136 (Super. Ct. Nos. DP017152 & DP017153) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Jane Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed. Request for judicial notice. Granted.

Matthew I. Thue, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minors.

* * *

INTRODUCTION

Bryan I. and Joyce B., now 12 and 10 years old, respectively, were removed from the custody and care of their mother, Debra B. (mother), in June 2008. Reunification services were denied, pursuant to Welfare and Institutions Code section 361.5, subdivision (b)(10) and (11), because mother had failed to reunify with and had her parental rights terminated to several of Bryan and Joyce's half siblings, and had failed to correct the problems leading to those earlier dependency proceedings. (All further statutory references are to the Welfare and Institutions Code.) In May 2009, the juvenile court denied mother's petition under section 388, which asked the court to return the children to her care or order reunification services. The court also made findings that termination of parental rights would not be detrimental to Bryan and Joyce, that Bryan and Joyce had a probability of adoption but were difficult to place, and that no prospective adoptive parent had been identified. Pursuant to section 366.26, subdivisions (b)(3) and (c)(3), the court therefore identified adoption as the permanent plan for Bryan and Joyce, without terminating mother's parental rights, and ordered the Orange County Social Services Agency (SSA) to locate an adoptive family. Mother appealed from these orders. We affirm.

We conclude the juvenile court did not err by summarily denying mother's section 388 petition. Mother failed to make a prima facie showing that there had been a change in circumstances, or that revoking the court's prior orders would be in Bryan and Joyce's best interests.

We further conclude the juvenile court did not err by identifying adoption as the permanent plan for Bryan and Joyce without terminating mother's parental rights. The court's finding that Bryan and Joyce had a probability of adoption was supported by substantial evidence.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Bryan and Joyce were taken into protective custody, along with their half sister Diana B., by SSA in June 2008.[1] Bryan, Joyce, and Diana (sometimes referred to collectively as the children) were removed from mother's custody after their adult half sibling reported that Luis L., the boyfriend of their maternal grandmother, had sexually abused him (and another now-adult half sibling) when he was between the ages of three and nine, and threatened to kill him if he reported the abuse.

In June 2008, Luis was staying in a motel with mother, the maternal grandmother, and the children. Mother and the maternal grandmother did not believe any sexual abuse of the children's adult half siblings had occurred. The motel room in which the family was staying was filthy. The children's school reported they were frequently unkempt, had extremely poor hygiene, and were chronically late for school.

A juvenile dependency petition was filed on June 13, 2008, alleging the children came within section 300, subdivisions (b), (d), and (j). The petition, as later amended, alleged: (1) mother lived in unsanitary, unhealthy, and unsafe living conditions, despite intervention by SSA and the juvenile court, placing the children at risk of harm or illness; (2) the children had been infested with lice, wore dirty and smelly clothes, had poor hygiene, and were unkempt; (3) mother had failed to ensure Bryan and Joyce regularly attended school or received their prescribed medication for attention deficit disorder; (4) mother's lifestyle lacked stability and consistency; (5) Bryan's alleged fathers failed to protect Bryan from mother's neglect, and their whereabouts were unknown; (6) Joyce's alleged father had failed to protect her from mother's neglect, due

[1] The dependency proceedings involving Diana have proceeded along a slightly different track. Diana is not a party to this appeal. She will be mentioned as necessary throughout this opinion. We grant SSA's request that we take judicial notice of our unpublished opinion involving Diana's dependency proceedings, *Debra B. v. Superior Court* (Aug. 25, 2009, G042135) [nonpub. opn.].

to his incarceration; (7) mother had allowed the children to be in contact with Luis, despite (a) mother's knowledge that he had sexually abused the children's now-adult half siblings, and had threatened to kill them if they disclosed the abuse, and (b) the fact mother herself had been raped by Luis when she was a minor, thereby placing the children at significant risk of sexual abuse and physical harm; and (8) since 1992, several other half siblings had been dependents in the juvenile court system, and mother had failed to reunify with any of them. The children were placed together in foster care.

Mother pleaded no contest to the amended petition at a jurisdiction hearing in August 2008. The juvenile court found the allegations of the amended petition true by a preponderance of the evidence. At a disposition hearing in September 2008, the court declared the children to be dependent children, and found vesting custody with SSA was in their best interests. The court also found, pursuant to section 361.5, subdivision (b)(10) and (11), that reunification services need not be provided to mother.[2] Mother did not challenge the juvenile court's dispositional findings.

In March 2009, mother submitted a petition pursuant to section 388, asking the juvenile court to return the children to her care, to implement a plan to gradually return the children to her care, or to order family reunification services. In a declaration

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[2] "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] . . . That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian. [¶] . . . That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent." (§ 361.5, subd. (b)(10), (11).)

attached to the petition, mother declared the following: (1) she was living in a one-bedroom apartment, and would be eligible to move into a two-bedroom apartment if the children were returned to her care; (2) mother had completed individual counseling and "made progress in all of [her] therapy goals"; (3) she completed a parenting class through Olive Crest and a parenting program through Orange County Youth and Family Services; (4) mother's positive drug test in December 2008 was due to pain medication, prescribed by a medical doctor following gynecological surgery; (5) mother's independent living mentor worked with mother to establish independent living skills, and stated mother had "shown great improvement in the areas of health, hygiene, shopping for household necessities, budgeting and being more assertive"; (6) mother's monitored visits were positive; (7) mother had completed her case plan and was willing to complete any additional services; and (8) returning the children to mother's care would be in their best interests because mother was "now able to show the stability [she had] secured after learning from the various services [she had] completed," and because, although they had been out of mother's care and custody since June 2008, mother had "been the most constant thing in their lives." The children's counsel opposed the petition.

On May 28, 2009, the juvenile court denied mother's section 388 petition. Pursuant to section 366.26, subdivision (c)(3), the court found by clear and convincing evidence that termination of parental rights would not be detrimental to Bryan and Joyce; Bryan and Joyce had a probability of adoption, but were difficult to place; and there was no identified or available prospective adoptive parent. The court therefore identified adoption as the permanent plan goal, and ordered that efforts be made to locate an adoptive family, without terminating parental rights. The matter was continued to September 10, 2009, for selection of a permanent plan. Mother timely appealed.

DISCUSSION

I.

THE JUVENILE COURT DID NOT ABUSE ITS DISCRETION BY SUMMARILY DENYING MOTHER'S SECTION 388 PETITION.

A. *Our prior opinion*

Mother contends the juvenile court erred by failing to hold a hearing on her section 388 petition. In *Debra B. v. Superior Court*, *supra*, G042135, we addressed the same argument regarding the same order on the same section 388 petition, in a matter involving Bryan and Joyce's half sister, Diana. We set forth here our analysis from that opinion, which is equally applicable in this case.

"Mother contends the juvenile court abused its discretion by summarily denying her section 388 petition. We apply the abuse of discretion standard in our review of the juvenile court's decision to deny the section 388 petition without a hearing. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) We may not reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 319.) We affirm the order unless it '"'exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'"' (*In re Brittany K.*, *supra*, 127 Cal.App.4th at p. 1505.) The juvenile court's decision will not be disturbed unless the court '"'has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].'" [Citations.]' (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

"'The parent seeking modification [through a section 388 petition] must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" [Citations.] There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.]

If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing.' (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

"The juvenile court concluded mother had failed to satisfy either prong of the prima facie test, and denied the section 388 petition without an evidentiary hearing: 'First of all, in a [section] 388 motion the court notes that although the petition should and must be liberally construed in favor of granting a hearing, the court need not put on blinders when determining whether the required showing has been made. The court can consider the entire factual and procedural history of a case when evaluating the significance and strength of the allegations in the [section] 388 petition. [¶] So that's what the court is going to do here when the court considers the two prongs. [¶] First, in terms of the circumstances here, the court notes the attachments that mother has put with her [section] 388 motion to indicate changed circumstances. . . . Mother has attended various classes and programs, but there is not a showing that she has benefitted from those or been able to apply what she is supposed to have learned. And that is the court's concern with the attempt to make the showing here. And the court is concerned about that. The court understands this is not the time to prove anything but at least to make the record that it's showing. The court finds that that showing is not made here. [¶] Second, there is not a showing that the change would be in the best interest of the children. Reunification services were ordered terminated in September of 2008.[3] The court is not aware of what the reasons were for the prior judge's order to allow considerable funding to go forward for services. However, the court previously made that order. Those funds were ordered. But in any event there is no showing of why any such change would be in

[3] Reunification services were never ordered for mother, pursuant to section 361.5, subdivision (b)(10) and (11).

the best interest of the children. [¶] So with all that before the court and the court, having heard arguments of counsel, denies the motion at this time.'

"The attachments to mother's section 388 petition did not show anything had changed. The letter from mother's therapist does not establish she completed therapy, or describe any progress she made in therapy. The letter merely states mother arrived on time for and 'actively participated' in her weekly sessions. Mother's personal care assistant (whom mother describes as an independent living mentor) reported mother was 'a very good advocate for [herself] in expressing her needs and feelings,' and 'continues to put forth an effort in trying to obtain her three children by doing whatever the court ask[s] of her.' The personal care assistant's letter, however, fails to show mother had changed any of the behaviors that had led to the dependency proceedings for her children. Although mother's need for pain medication following surgery could explain her positive drug test in December 2008, mother failed to provide this explanation until she filed her section 388 petition, and she did not submit to any drug tests after December 2008.

"Mother received significant reunification services in other dependency proceedings. She also received other help from SSA and the juvenile court to try to change the behaviors that prevented her from providing adequate care for her children. Because mother failed to change those behaviors, the juvenile court correctly found mother had not made a 'reasonable effort to treat the problems that led to removal of' Diana's half siblings. The court did not err in determining the section 388 petition showed, at most, changing but not changed circumstances.

"In determining whether the relief sought by a section 388 petition would be in the best interests of the child, the following factors should be considered: '(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be

easily removed or ameliorated, and the degree to which it actually has been.' (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

"Mother concedes the problems leading to dependency were serious. Mother contends that she has resolved those problems, citing her completion of parenting classes and work with a mentor. SSA, however, detailed problems arising at monitored visits which showed mother had either failed to internalize what she had learned, or was unable to put it into practice. Mother's statement that she had been 'the most constant thing' in Diana's life is unsupported by anything in the record, and demonstrates mother's inability to truly understand Diana's needs or the responsibilities mother would face if Diana were returned to her care. Notably, nowhere in the section 388 petition does mother address the allegations of sexual abuse against the maternal grandmother's boyfriend. At the time Diana was detained, mother had responded to the sexual abuse allegations and the allegations she had continued to allow the maternal grandmother's boyfriend to have contact with Diana and her half siblings, by stating, '"I thought the case was closed,"' '"I don't know why they keep bringing that up,"' and '"I'm becoming a Christian and letting the past be the past."' Her failure to display any current understanding of the problems or explain how she would protect Diana from becoming the victim of sexual abuse is telling.

"In short, mother failed to show that the services in which she participated could overcome the lengthy history of failing to use previous services to change her behavior to protect and care for her children.

"The strength of the relative bonds between the dependent children to both parents and caretakers becomes an even more important factor when a section 388 petition is filed after reunification services have been terminated. In *In re Stephanie M., supra,* 7 Cal.4th [at page] 317, the California Supreme Court stated, '[a]fter the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point "the focus

shifts to the needs of the child for permanency and stability" [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.' The same standard must apply when reunification services were never provided.

"Here, the section 388 petition did not in any way address the strength of the relative bonds of the children to mother and to the foster parents. Diana had been placed in the home of the foster parents since July 2008, and had flourished there. The social worker reported that Diana had adjusted well to life with her foster parents, referred to them as '"Mom"' and '"Dad,"' and the foster parents had a 'high degree of pleasure . . . caring for her.' Diana's medical and behavioral problems had resolved.

"'At this point in the proceedings, on the eve of the selection and implementation hearing, the children's interest in stability was the court's foremost concern, outweighing any interest mother may have in reunification.' (*In re Anthony W.*, *supra*, 87 Cal.App.4th [at pp.] 251-252.) We conclude the juvenile court did not err in denying mother's section 388 petition without an evidentiary hearing." (*Debra B. v. Superior Court*, *supra*, G042135.)

B. *Additional facts and analysis*

Bryan's court appointed special advocate (CASA) reported to the juvenile court in January 2009 that he was "a fairly normal, likeable 11 year old with no physical or mental handicaps beyond his ADHD. He has the potential to be a successful adult." The CASA report noted that Bryan's "foster parents have provided Bryan with what appears to be a safe and loving environment and have exercised flawless judgment in making decisions about Bryan's welfare in my opinion. Overall, I believe Bryan has made excellent progress, primarily as the result of the parenting provided by his foster

family." In a report filed with the court in March 2009, Bryan's CASA volunteer reported his behavior and academic performance were improving at school, and Bryan's therapist reported he was improving in therapy as well. Another report was filed on May 28, 2009, stating Bryan had been defiant and disruptive at school, and had also become more defiant at home. The report also noted that Bryan had difficulty bonding with his foster parents and foster siblings. The report attributed these problems to the delay in formalizing a placement for Bryan: "It is my opinion that delays in deciding Bryan's permanent placement are detrimental to Bryan and may result in escalating behavioral problems. Because of the length of time Bryan has spent with his biological mother, Bryan is certain to have bonding problems in any placement. The longer he is in limbo, the more difficult the bonding will be if he is adopted. It is also my opinion that if he is returned to his mother, his chances for success as an adult will be negligible."

Joyce's health and hygiene improved significantly while in foster care. Joyce did not ask to see mother, and expressed a desire to be adopted and not to be returned to mother's care. Joyce gradually began showing emotion and becoming more affectionate, and got along better with Bryan. The CASA report for Joyce filed on May 28, 2009, noted that although Joyce tested well in math, she had more difficulty with reading comprehension and writing, and would require a neurological examination due to her "muscle flaccidity."

Mother argues "she was the only adult willing to provide the [children] with long-term care." To the contrary, the foster mother had applied for de facto parent status, the foster parents expressed a desire to keep the children until a permanent home could be found, and the foster parents were unable to adopt the children themselves only because they had already adopted numerous children the same ages as Bryan and Joyce. Most importantly, as of the date of the hearing on the section 388 petition, a prospective adoptive family had been identified, which was considering adopting Bryan, Joyce, and

Diana. Despite mother's protestations to the contrary, it is unfair to describe the children's prospects for permanency as "bleak."

The juvenile court did not abuse its discretion by summarily denying mother's section 388 petition vis-à-vis Bryan and Joyce.

II.

THE JUVENILE COURT DID NOT ERR BY FINDING BRYAN AND JOYCE HAD A PROBABILITY OF ADOPTION.

Mother also argues the juvenile court erred by proceeding under section 366.26, subdivision (b)(3), at the permanency planning hearing, because there was no evidence Bryan and Joyce had a probability for adoption. There is a split of authority regarding the applicable standard of review. (*In re Gabriel G.* (2005) 134 Cal.App.4th 1428, 1438 (*Gabriel G.*) [reviewed for substantial evidence]; *In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1351 (*Ramone R.*) [reviewed for abuse of discretion].) Given the facts of this case, under either standard, the result is the same.

At the permanency planning hearing under section 366.26, the juvenile court must do one of the following, in this order of preference: (1) terminate parental rights and order that the child be placed for adoption; (2) appoint a relative with whom the child currently resides as legal guardian; (3) if the child has a probability of adoption but is difficult to place, "identify adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days"; (4) appoint a nonrelative as the child's legal guardian; or (5) order the child to be placed in long-term foster care. (§ 366.26, subd. (b); see § 366.26, subd. (c)(3).) In this case, the court made findings under section 366.26, subdivisions (b)(3) and (c)(3), that Bryan and Joyce had a probability of adoption, but were difficult to place. Therefore, adoption was identified as the permanent placement goal, and the court ordered SSA to locate an appropriate adoptive family. Mother contends there was no evidence Bryan and Joyce had a probability of being adopted, and

the juvenile court therefore erred by failing to order them into long-term foster care instead. (Mother does not challenge the finding that termination of parental rights would not be detrimental to Bryan and Joyce.)

"In determining whether a child is likely to be adopted, the juvenile court must focus on the child and whether the child's age, physical condition, and emotional state may make it difficult to find an adoptive family. [Citation.] Under [section 366.26,] subdivision (c)(3), the court merely needs to find that, under the circumstances, the children have a probability of adoption. Although mother points to the problems that make the children difficult to place, there is other evidence to support the finding that adoption is probable. They are young children—only three and five years of age. Both are healthy, developmentally on target in most areas, and they are physically appealing. Although their behavioral problems could make placement difficult, the social worker believed that a stable adoptive home might be the way to address those problems. This is sufficient, in our view, to support a finding that Roland and Gabriel had the probability of adoption." (*Gabriel G.*, *supra*, 134 Cal.App.4th at p. 1438.)

Mother contends Bryan and Joyce have many obstacles in the way of adoption. Specifically, mother notes Bryan is now 12 years old, Joyce is now 10 years old, and they are a sibling set, along with four-year-old Diana. Additionally, both Bryan and Joyce exhibited emotional, behavioral, and developmental problems.

Mother therefore likens the present case to *Ramone R.*, *supra*, 132 Cal.App.4th at page 1343, where the dependent child, Ramone, had suffered severe burns as a result of being immersed in scalding water. Ramone was placed in a medically fragile infant (MFI) foster home; he took antibiotics and was required to wear compression stockings 24 hours a day due to the burns he had suffered. (*Id.* at p. 1344.) Ramone suffered severe behavioral problems, including screaming, head banging, and smearing his feces, to the extent that his highly experienced MFI foster parent required respite care. (*Id.* at p. 1352.) Despite these facts, the juvenile court found Ramone's

adoption was probable, although he was difficult to place, based on statements made by counsel during argument that potential adoptive parents had just become known to the department of human services. (*Id.* at p. 1347.) The appellate court concluded there was no evidence that Ramone's adoption was probable, and therefore determined the juvenile court had abused its discretion in proceeding under section 366.26, subdivisions (b)(2) and (c)(3), rather than ordering Ramone to remain in long-term foster care. "When it made its findings, the court referred to the arguments of counsel suggesting other family members were interested in taking Ramone. These arguments were not evidence, however, and even if credited they established no more than the kind of last-minute volunteerism that is not unusual at section 366.26 hearings. The court was given no reason to believe these candidates (including Eva R., who had failed to follow through on previous attempts by DHS to facilitate a placement) were actually able to provide an appropriate adoptive home. The record strongly suggests that foster care in the MFI home was the only decent care Ramone ever experienced. Without some evidence that care appropriate to his special needs would be available in an adoptive home or the home of a legal guardian, it was an abuse of discretion to proceed under section 366.26, subdivisions (b)(2) and (c)(3), which meant that in 180 days Ramone would no longer be eligible for the kind of expert foster care he was currently receiving." (*Ramone R., supra*, 132 Cal.App.4th at p. 1352.)

We find the facts of the present case wholly distinguishable from those in *Ramone R.* Neither Bryan nor Joyce is medically fragile, and neither requires the type of round-the-clock care provided by the specialized foster parent in *Ramone R.* Further, although Bryan and Joyce both exhibited some behavioral and emotional problems, they are simply not on a par with the severe behavioral problems exhibited by Ramone. The CASA reports gave reason to believe a permanent placement would alleviate some if not all of these problems. (See *Gabriel G., supra*, 134 Cal.App.4th at p. 1438.) SSA had offered evidence of a prospective adoptive family, although that placement was

admittedly not finalized. As discussed *ante*, Bryan and Joyce had been in a single foster care placement for an extended period with no problems, no requests for transfer, and no need for respite on the part of the foster parents. Finally, Bryan and Joyce's foster placement, though obviously highly beneficial to both of them, was not the type of specialized foster home in which Ramone was placed.

There was substantial evidence supporting the juvenile court's finding that Bryan and Joyce had a probability of adoption, and the juvenile court did not abuse its discretion in so finding.

DISPOSITION

The orders are affirmed.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.